

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	ID No. 9811012362
)	
WILLIAM GREGORY,)	
)	
Defendant.)	

Submitted: February 19, 2010
Decided: May 28, 2010

On Defendant's *Pro Se* Motion for Postconviction Relief. DENIED.

ORDER

Susan Dwyer, Deputy Attorney General, Wilmington, Delaware 19801. Attorney for State of Delaware.

William Gregory, James T. Vaughn Correctional Center, 1181 Paddock Road, Smyrna, Delaware 19977. *Pro se*.

CARPENTER, J.

On this 28th day of May 2010, upon consideration of Defendant's Second *Pro Se* Motion for Postconviction Relief, it appears to the Court that:

1. William Gregory ("Defendant") has filed a Second *Pro Se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). For the reasons set forth below, Defendant's Second *Pro Se* Motion for Postconviction Relief is **DENIED**.

2. Defendant was indicted on February 1, 1999 on the following counts: (1) Attempted Murder First Degree; (2) Possession of a Firearm During the Commission of a Felony; (3) Conspiracy First Degree; (4) Assault Second Degree; and (5) Possession of a Deadly Weapon During the Commission of a Felony. Defendant and his co-defendant simultaneously stood trial from February 15 – 18, 2000. Defendant was found guilty on February 18, 2000 and was sentenced on May 12, 2000. Defendant then appealed his conviction on June 14, 2000, and the Supreme Court affirmed the conviction on August 20, 2001.

Defendant's First *Pro Se* Motion for Postconviction Relief was then filed on August 19, 2004. On June 17, 2005, the Court accepted Defendant's amendment to his Motion for Postconviction Relief and both the State and counsel were given time to respond. Defendant's First *Pro Se* Motion for Postconviction Relief was denied on November 23, 2005. On appeal, the Supreme Court affirmed the lower court's

decision on December 1, 2006. Before this Court is Defendant's Second *Pro Se* Motion for Postconviction Relief filed on February 1, 2010.

3. In this Second *Pro Se* Motion for Postconviction Relief, Defendant raises four issues for the Court to consider: (1) whether *Allen v. State*¹ required a 11 *Del. C.* §274 instruction be given to the jury²; (2) whether there was sufficient evidence to convict Defendant on all counts³; (3) whether counsel was ineffective for failing to request a 11 *Del. C.* §274 jury instruction⁴; and (4) whether counsel was ineffective for failing to challenge the sufficiency of evidence to sustain Defendant's conviction⁵.

4. Prior to addressing the merits of a postconviction relief claim, the Court must first determine whether the Motion meets the procedural requirements of Rule 61(i).⁶ This section of Rule 61 sets forth procedural bars governing the proper filing of a motion for postconviction relief: (1) the motion must be filed within three years of the final judgment of conviction;⁷ (2) any ground for relief not raised in a prior post conviction motion will be barred if raised in the instant Motion; (3) any claims which the Defendant failed to assert in the proceedings leading to his conviction are barred,

¹ 970 A.2d 203 (Del. 2009).

² Def.'s Mot. at 3, 8.

³ Def.'s Mot. at 5, 14.

⁴ Def.'s Mot. at 7, 21.

⁵ Def.'s Mot. at 7, 24.

⁶ See *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996).

⁷ See *Anderson v. State*, 755 A.2d 386 (Del. 2000) (applying Rule 61 as it was written prior to its subsequent amendment which changed the original three-year timeframe for filing a timely motion for postconviction relief to the current one-year limitation). Because the Defendant's conviction in this case became final in August 2001, the original three-year timeframe applies to the Defendant's case.

unless he is able to show cause for relief from the procedural default and prejudice from violation of the movant's rights; and (4) any ground for relief raised in this Motion must not have been formerly adjudicated in any proceeding leading to the conviction, unless the interest of justice requires reconsideration.⁸ Rule 61(i)(5) also provides a "miscarriage of justice" exception which allows review of claims that are barred from relief under (1)-(3) if a constitutional violation undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

5. After reviewing the Defendant's present motion, the Court finds that it is untimely under Rule 61(i)(1). Under Rule 61(i)(1), Defendant's motion must have been filed within three years of the final judgment of conviction. Defendant's conviction became final on August 20, 2001, therefore in order for this motion to be timely Defendant must have filed this present motion no later than August 20, 2004. This motion was filed on February 1, 2010 – over five years after the filing deadline. Thus, under Rule 61(i)(1), Defendant's motion is time-barred.

6. In addition, Defendant's claim as to sufficiency of evidence to convict Defendant on all counts is also barred under Rule 61(i)(2) and (3). Rule 61(i)(2) bars any grounds of relief that were not previously raised in a prior post conviction

⁸*State v. Greer*, 2008 WL 1850625 (Del. Super. Mar. 4, 2008); *see also* Super. Ct. Crim. R. 61(i)(1)-(5).

motion, and Rule 61(i)(3) bars claims which Defendant failed to assert in the proceedings leading up to his conviction, unless cause for relief from the procedural default and prejudice from violation of the movant's rights. Defendant submits that the issue is whether the victim's medical records and forensic evidence from the revolver and baseball bat provide a prima facie case for the State's theory that the defendant struck the victim causing severe head trauma.⁹ This sufficiency of evidence claim was neither raised in the proceedings leading up to the conviction nor in Defendant's First *Pro Se* Motion for Postconviction Relief. Furthermore, Defendant has not shown cause for relief from the procedural default and prejudice from violation of the movant's rights. Defendant has made no showing or hinted as to why this issue was not raised in his prior appeal to the Supreme Court or even his First *Pro Se* Motion for Postconviction Relief.

Defendant also cannot overcome the Rule 61(i)(5) "miscarriage of justice" exception as to this claim. The grand jury, trial jury and the Supreme Court found the evidence sufficient to convict the Defendant of all charges. Furthermore at trial, the medical records were not introduced as part of the evidence, yet the jury still found the remaining evidence sufficient to convict the Defendant. As such, because the Court cannot find a constitutional violation of Defendant's rights, the Defendant's claim is procedurally barred and dismissed.

⁹ Def.'s Mot. at 16.

7. Rule 61(i)(4) also bars Defendant's claim alleging ineffective assistance of counsel for failing to challenge the sufficiency of evidence. Under Rule 61(i)(4), any ground for relief raised in the present motion must not have been formerly adjudicated in any proceeding leading up to the conviction, unless the interest of justice requires reconsideration. Defendant's argument focuses on counsel's alleged failure to challenge the sufficiency of the medical evidence prior to and during trial. Defendant contends that had counsel investigated the medical reports, counsel would have been aware that there was insufficient evidence to convict the Defendant. This argument is similar to one previously raised and addressed by this Court.

A review of this Court's order to Defendant's First *Pro Se* Motion for Postconviction Relief would reveal that the Court previously addressed whether counsel was ineffective for allegedly failing to conduct additional medical investigation specific to the "multiple gunshot wounds and injuries consistent with being hit with a baseball bat."¹⁰ The Court concluded that such evidence was not relevant to Defendant's trial because counsel's decision to concede the victim's injuries was a tactical strategic decision and such a decision did not amount to ineffective assistance of counsel.¹¹ Because Defendant's present claim has already been addressed by this Court, the claim is barred under Rule 61(i)(4).

¹⁰ *State v. Gregory*, 2005 WL 3194482, at *2 (Del. Super. Nov. 23, 2005).

¹¹ *Id.*

Defendant also has not provided a basis to review this claim under the “interest of justice” exception. This exception is narrow and is only invoked if the Defendant can show that “subsequent legal developments have revealed that the trial court lacked the authority to convict or punish [the movant].”¹² The instant motion does not raise any arguments regarding subsequent legal developments and thus this claim is procedurally barred and is dismissed.

8. Defendant’s two remaining claims request review in light of the 2009 Supreme Court decision in *Allen v. State*¹³. Although these claims are procedurally barred for being untimely, the Court has recognized a new “right” under *Allen* with respects to the §274 jury instruction.¹⁴ Therefore, this Court will review Defendant’s claims as pertains to the *Allen* decision.

As a preface, the Delaware Supreme Court’s decision in *Allen* clarified a two-step process under 11 *Del. C.* §271 and 11 *Del. C.* §274. First, 11 *Del. C.* §271 provides generally, that a person is guilty of an offense committed by another person if an appropriate degree of complicity in the offense can be proved. Second, under 11 *Del. C.* §274, despite being criminally liable for an offense under §271, the degree of the offense for which the co-defendants are guilty depends upon each co-

¹² *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990).

¹³ 970 A.2d 203 (Del. 2009).

¹⁴ See *State v. Travis*, 2009 WL 5928077, at *8 (Del. Super. Dec. 7, 2009); *State v. Oropeza*, 2010 WL 1511570, at *5 (Del. Super. Apr. 16, 2010).

defendant's own respective "culpable mental state" and "accountability for an aggravating fact or circumstance."¹⁵

9. Under this *Allen* backdrop, the Defendant contends that because the Defendant and co-defendant were tried simultaneously, it became unclear to the jury that the trial consisted of two separate trials in which the jury was to view the evidence independently as to each defendant and each charge.¹⁶ Therefore, the jury believed the co-defendants were being tried together and as such, the jury may have based the Defendant's guilt on the actions of the co-defendant which invokes 11 *Del. C.* §271. Thus through 11 *Del. C.* §271, the Defendant argues an 11 *Del. C.* §274 instruction was warranted under *Allen*.¹⁷

A review of the jury instructions indicates to the Court that the Defendant's argument lacks merit. The jury was clearly instructed as to the proper way to proceed during deliberations, and the Court believes such an instruction would have eliminated any confusion a juror might have experienced during trial with regard to the separate and independent trials of each co-defendant. The jury was instructed the following:

I again remind you that while there are two defendants charged with identical charges and they have been tried together, you must consider each defendant separately and

¹⁵ *Allen*, 970 A.2d at 210.

¹⁶ Def.'s Mot. at 10.

¹⁷ *Id.*

base your verdict solely upon the evidence that you find specifically relates to that particular defendant. Again, you must reach a separate verdict as to each defendant with regard to each offense.¹⁸

The Court's instructions make it clear that the jury was to make separate individualized findings as to each Defendant and each charge.

However, even if the Court was to give merit to the Defendant's claim, Defendant's Attempted Murder First Degree conviction remains untouched by *Allen* as explained in the Court's previous ruling in *State v. Richardson*.¹⁹

10. Consequently, because the Court concludes that *Allen* does not apply, Defendant's ineffective assistance of counsel claim regarding counsel failing to request a 11 *Del. C.* §274 need not be addressed and is subsequently dismissed.

11. For the foregoing reasons, the Defendant's Second *Pro Se* Motion for Postconviction Relief is DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

¹⁸ Jury Instructions at 5.

¹⁹ 2009 WL 2854745, at *5 (Del. Super. June 23, 2009).